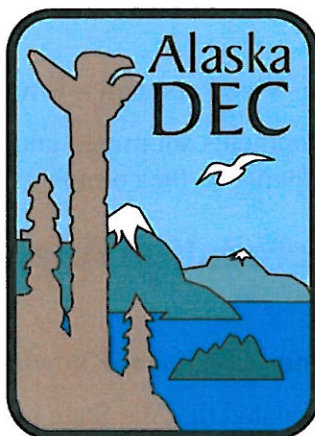


Response to Comments
For
CWA 401 Certificate of
NPDES Permit No. AKG31-5000
Cook Inlet NPDES General Permit
Re-proposed Limits

Public Noticed May 20 – June 20, 2011

October 20, 2011



Alaska Department of Environmental Conservation

Wastewater Discharge Authorization Program

555 Cordova Street

Anchorage, AK 99501

1.0 Public Participation

1.1 Opportunities for Public Participation

On May 20, 2011, the U.S. Environmental Protection Agency (EPA) issued a public notice for the re-proposal of six produced water effluent limitations in the Cook Inlet National Pollutant Discharge Elimination System (NPDES) General Permit AKG31-5000 (General Permit). The EPA public notice also served as notice of the opportunity to comment on the Alaska Department of Environmental Conservation's (DEC or the department) draft Clean Water Act (CWA) Section 401 Certification of EPA's General Permit, including an antidegradation analysis, which had been provided by DEC to EPA on May 3, 2011.

1.2 List of Commenters

DEC received comments from six interested parties on the Section 401 Certificate and its accompanying antidegradation analysis. Comments were received from:

- Alaska Oil and Gas Association (AOGA), Kate Williams, Regulatory Affairs Representative
- ConocoPhillips Alaska, William Muldoon, Director, Permits & Sciences
- Nanwalek IRA Council
- Trustees for Alaska, Vicki Clark, Legal Director
- Union Oil Company of California (Union Oil), Dale Haines, Manager, Oil & Gas Operations
- XTO Energy, Nina Hutton, Vice President – Environmental, Health & Safety

This document summarizes the comments submitted and the justification for any action taken or not taken by the department in response to the comments.

2.0 Comments on Antidegradation Analysis for Reproposed Effluent Limits

2.1 Comment Summary: Subsistence and Local Knowledge

The Nanwalek IRA Council commented that the State of Alaska performed little to no analysis of local knowledge, subsistence obligations, impact of less stringent limits on subsistence foods, and long-term effects of consumption in its antidegradation analysis.

Response:

Neither the Antidegradation policy found at 18 AAC 70.015 nor the July 2010 *Interim Antidegradation Implementation Methods (Interim Methods)* require that the State of Alaska address local knowledge or subsistence use in its antidegradation analysis. However, subsistence use is addressed in the antidegradation analysis indirectly through 18 AAC 70.015(2)(C) *the resulting water quality will be adequate to fully protect existing uses of the water*. One of the existing uses is growth and propagation of fish, shellfish, other aquatic life, and wildlife. The department has considered this growth and propagation of fish, shellfish, other aquatic life, and wildlife use in light of the study required by the 2007 General Permit and conducted by operators

discharging more than 100,000 gallons of produced water per day. The report of this study, “*Produced Water Discharge Fate and Transport in Cook Inlet, 2008-2009, NPDES Permit No. AKG-31-5000*,” indicates that there is no evidence of increased contamination from the produced water in sediments or water and that water quality criteria are being met. Using this evidence, the department has concluded in its draft antidegradation analysis for the General Permit that the resulting water quality will be adequate to fully protect growth and propagation of fish, shellfish, other aquatic life, and wildlife, and other existing uses.

2.2 Comment Summary: Interim Methods are illegal and therefore constitute backsliding

Trustees for Alaska commented that the re-proposed effluent limits are legally flawed because the State has not promulgated a legal implementation policy.

Response:

First, case law supports the proposition that state agencies may use guidance to interpret and implement regulations without going through another rule-making procedure as long as guidance does not add any substantive requirement to the regulations. Second, *Interim Methods* were conceived, developed, and implemented through legal means. While there is now a legal challenge to the guidance, the Court has not stayed their effect while that recent case is pending. In the absence of a stay, unless and until *Interim Methods* are determined to be illegal, DEC will continue to use them. Finally, the antidegradation policy in regulation governs the implementing guidance. The guidance is simply a tool to help guarantee responsible and consistent application of the policy by DEC staff.

2.3 Comment Summary: Re-proposed limits constitute backsliding

Trustees for Alaska commented that the re-proposed effluent limits are legally flawed and constitute backsliding because DEC has not promulgated a legal implementation plan for its antidegradation policy, and therefore DEC cannot determine that the re-proposed effluent limits comply with Alaska’s antidegradation policy.

Response:

See the response to Comment 2.2.

2.4 Comment Summary: Antidegradation policy and methods have been applied correctly.

Several commenters (AOGA, ConocoPhillips, and Union Oil) commented that Alaska’s antidegradation policy and/or implementation guidance have been adopted correctly and have been applied correctly in the analysis.

Response:

Noted.

2.5 Comment Summary: DEC should reference EPA’s Technical Support Document for Coastal Effluent Guidelines.

Union Oil and XTO Energy commented that while DEC has correctly concluded that reinjection is not economically feasible for Cook Inlet oil and gas, it is also not technically feasible for many Cook Inlet facilities, as EPA’s Technical Support Document for the Coastal Effluent Guidelines (TSD) states. Union Oil and XTO Energy requested that DEC reference or incorporate EPA’s analysis in the TSD in DEC’s antidegradation analysis.

Response:

DEC believes that the commenters are referring to EPA's October 1996 *Development Document for Final Effluent Limitations Guidelines and Standards for the Coastal Subcategory of the Oil and Gas Extraction Point Source Category*. DEC agrees that this document states that reinjection of produced water is not technically feasible for many Cook Inlet facilities due to underlying geography. DEC will incorporate reference to this Development Document into its antidegradation analysis.

2.6 Comment Summary: DEC should reference the mixing zone analysis in the 2007 401 Certification to indicate that existing uses are fully protected.

Union Oil requested that DEC note the results of the mixing zone analysis conducted to support DEC's 2007 401 Certification of the General Permit, which showed that organisms would not be exposed to significant pollutant concentrations above water quality standards.

Response:

Because the mixing zones are not within the scope of the current re-proposal, DEC will not be referencing the results of the mixing zone analysis that supported the 2007 401 Certification of the General Permit.

3.0 Comments on topics other than Antidegradation Analysis for Re-Proposed Effluent Limits

3.1 Introduction

As explained in EPA's Fact Sheet for the General Permit, the Ninth Circuit Court of Appeals in its October 21, 2010 decision remanded only the re-proposed effluent limits to EPA. EPA re-proposed those limits, requesting that DEC provide a Section 401 Certification of the limits with an antidegradation analysis consistent with the State's antidegradation policy at 18 AAC 70.015. Because other aspects of the 2007 permit were not remanded, DEC is only addressing comments on the re-proposed limits and the antidegradation analysis. However, several other comments were received, and they are discussed in Section 3.0.

3.2 Comment Summary: Mixing zones in 2007 General Permit are not part of the remand to EPA.

Comments from Union Oil and XTO Energy indicated that DEC's mixing zones are not subject to reconsideration and that DEC correctly relied upon the earlier determination of those mixing zones. Additionally, AOGA requested that if EPA reverted to the 1999 limits, DEC would need to perform a new mixing zone analysis and develop a new 401 Certification.

Response:

EPA does not intend to revert to the 1999 limits; therefore, there will be no need for a new mixing zone analysis and 401 Certification.

3.3 Comment Summary: There is a lack of information on water quality effects and a lack of reliance on tribal concerns and subsistence information.

The Nanwalek IRA Council expressed concern at EPA's lack of current water quality information and questioned DEC's and EPA's use of tribal concerns taken in 2005 and 2003 as

well as a 2009 CDC report on subsistence foods.

Response:

See Section 2.1.

3.4 Comment Summary: EPA should impose more stringent technology-based effluent limits or require zero discharge.

Trustees for Alaska commented that EPA should impose technology-based effluent limits or require the “best available technology economically achievable” to control all pollutants, which is zero discharge. The Nanwalek IRA Council also requested that the more stringent effluent limits be reinstated.

Response:

This comment is within EPA’s scope, not DEC’s.

3.5 Comment Summary: Mixing zones are based on legally flawed calculations.

Trustees for Alaska commented that the mixing zones are based on legally flawed calculations and violate portions of DEC’s mixing zone regulations. Citing and including for reference the “Review of Draft NPDES General Permit for Cook Inlet, Alaska Oil and Gas Operators” by David LaLiberte of Liberte Environmental Associates (May 31, 2006), Trustees for Alaska commented that because the modeling for the permit is not accurate, DEC did not ensure the smallest possible mixing zones for the Permit. Trustees commented additionally that because the modeling inputs do not accurately reflect the hydrodynamics of Cook Inlet, the lengths of the mixing zones are ridiculously large.

Trustees for Alaska also commented that EPA and DEC continue to allow unlimited discharge volumes and the mixing zones calculated by the dischargers, with no independent verification.

Response:

As stated in Section 3.1, the Ninth Circuit Court of Appeals October 21, 2010 remand to EPA was limited to the repropoed limits and DEC’s antidegradation analysis. Because mixing zones were not remanded but were specifically denied by the Court, DEC is not addressing comments on the mixing zone calculations.

3.6 Comment Summary: Mixing zones must be proposed and public comment sought.

Trustees for Alaska commented that new mixing zones should be proposed and public-noticed.

Response:

See Section 3.5.

